

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

BRIAN L. HORST,

Plaintiff,

Case No. 3:17-cv-13

vs.

COMMISSIONER OF SOCIAL SECURITY,

District Judge Walter H. Rice

Magistrate Judge Michael J. Newman

Defendant.

**REPORT AND RECOMMENDATION¹ THAT: (1) THE ALJ'S NON-DISABILITY
FINDING BE FOUND SUPPORTED BY SUBSTANTIAL EVIDENCE, AND
AFFIRMED; AND (2) THIS CASE BE CLOSED**

This is a Social Security disability benefits appeal. At issue is whether the Administrative Law Judge ("ALJ") erred in finding Plaintiff not "disabled" and therefore unentitled to Supplemental Security Income ("SSI"). This case is before the Court on Plaintiff's Statement of Errors (doc. 7), the Commissioner's memorandum in opposition (doc. 8), Plaintiff's reply (doc. 9), the administrative record (doc. 5),² and the record as a whole.

I.

A. Procedural History

Plaintiff filed an application for SSI on October 29, 2013 alleging disability as a result of a number of impairments including, *inter alia*, bipolar disorder and a personality disorder. PageID 58-60, 236-41.

After an initial denial of his application, Plaintiff received a hearing before ALJ Henry Kramzyk on June 16, 2015. PageID 78-114. The ALJ issued a decision on November 23, 2015

¹ Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

² Hereafter, citations to the electronically-filed administrative record will refer only to the PageID number.

finding Plaintiff not disabled. PageID 56-70. Specifically, the ALJ found at Step Four that, based upon Plaintiff's residual functional capacity ("RFC") to perform a full range of work at all exertional levels subject to specific non-exertional limitations, he "was capable of performing past relevant work as a hand packager." PageID 762-70.

Thereafter, the Appeals Council denied Plaintiff's request for review, making the ALJ's non-disability finding the final administrative decision of the Commissioner. PageID 44-46. *See Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993). Plaintiff then filed this timely appeal. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007).

B. Evidence of Record

The evidence of record is adequately summarized in the ALJ's decision (PageID 56-70), Plaintiff's Statement of Errors (doc. 7), the Commissioner's memorandum in opposition (doc. 8), and Plaintiff's reply (doc. 9). The undersigned incorporates all of the foregoing and sets forth the facts relevant to this appeal herein.

II.

A. Standard of Review

The Court's inquiry on a Social Security appeal is to determine (1) whether the ALJ's non-disability finding is supported by substantial evidence, and (2) whether the ALJ employed the correct legal criteria. 42 U.S.C. § 405(g); *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 745-46 (6th Cir. 2007). In performing this review, the Court must consider the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When substantial evidence supports the ALJ's denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found Plaintiff

disabled. *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Thus, the ALJ has a “‘zone of choice’ within which he [or she] can act without the fear of court interference.” *Id.* at 773.

The second judicial inquiry -- reviewing the correctness of the ALJ’s legal analysis -- may result in reversal even if the ALJ’s decision is supported by substantial evidence in the record. *Rabbers v. Comm’r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009). “[A] decision of the Commissioner will not be upheld where the [Social Security Administration] fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right.” *Bowen*, 478 F.3d at 746.

B. “Disability” Defined

To be eligible for disability benefits, a claimant must be under a “disability” as defined by the Social Security Act. 42 U.S.C. § 423(d)(1)(A). Narrowed to its statutory meaning, a “disability” includes physical and/or mental impairments that are both “medically determinable” and severe enough to prevent a claimant from (1) performing his or her past job and (2) engaging in “substantial gainful activity” that is available in the regional or national economies. *Id.*

Administrative regulations require a five-step sequential evaluation for disability determinations. 20 C.F.R. § 416.920(a)(4). Although a dispositive finding at any step ends the ALJ’s review, *see Colvin*, 475 F.3d at 730, the complete sequential review poses five questions:

1. Has the claimant engaged in substantial gainful activity?;
2. Does the claimant suffer from one or more severe impairments?;
3. Do the claimant’s severe impairments, alone or in combination, meet or equal the criteria of an impairment set forth in the Commissioner’s Listing of Impairments (the “Listings”), 20 C.F.R. Subpart P, Appendix 1?;
4. Considering the claimant’s RFC, can he or she perform his or her past relevant work?; and
5. Assuming the claimant can no longer perform his or her past relevant work -- and also considering the claimant’s age, education, past work

experience, and RFC -- do significant numbers of other jobs exist in the national economy which the claimant can perform?

20 C.F.R. § 416.920(a)(4); *see also Miller v. Comm’r of Soc. Sec.*, 181 F.Supp.2d 816, 818 (S.D. Ohio 2001). A claimant bears the ultimate burden of establishing disability under the Social Security Act. *Key v. Comm’r of Soc. Sec.*, 109 F.3d 270, 274 (6th Cir. 1997).

III.

In his Statement of Errors, Plaintiff argues that the ALJ failed to: (1) appropriately weigh the opinion of his treating psychiatrist, Stephanie Fitz, M.D.; (2) find him credible; and (3) account for his moderate limitation in concentration, persistence, or pace in the hypothetical questions to the vocational expert (“VE”). Doc. 7 PageID 1031-40.

Having carefully reviewed the administrative record and the parties’ briefs, and also having carefully considered the ALJ’s analysis leading to the non-disability finding here at issue, the Court finds the ALJ carefully and reasonably developed and reviewed the record; appropriately considered the medical evidence at issue; properly weighed opinion evidence based upon reasons supported by substantial evidence; reasonably assessed Plaintiff’s credibility; posed appropriate hypothetical questions to the VE; accurately determined Plaintiff’s RFC; and appropriately concluded, at Step Four, that Plaintiff can perform his past-relevant work.

A. Dr. Fitz

Until March 27, 2017, “the Commissioner’s regulations [that apply to this appeal] establish[ed] a hierarchy of acceptable medical source opinions[.]” *Snell v. Comm’r of Soc. Sec.*, No. 3:12-cv-119, 2013 WL 372032, at *9 (S.D. Ohio Jan. 30, 2013). In descending order, these medical source opinions are: (1) treaters; (2) examiners; and (3) record reviewers. *Id.* Under the regulations then in effect, which control here, the opinions of treaters are entitled to the greatest deference because they “are likely to be . . . most able to provide a detailed, longitudinal picture of [a claimant’s] medical impairment(s) and may bring a unique perspective to the medical

evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations[.]” 20 C.F.R. § 416.927(c)(2).

A treater’s opinions must be given “controlling weight” if “well-supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence in [the] case record.” *LaRiccia v. Comm’r of Soc. Sec.*, 549 F. App’x 377, 384 (6th Cir. 2013). Even if a treater’s opinions is not entitled to controlling weight, “the ALJ must still determine how much weight is appropriate by considering a number of factors, including the length of the treatment relationship and the frequency of examination, the nature and extent of the treatment relationship, supportability of the opinions, consistency of the opinions with the record as a whole, and any specialization of the treating physician.” *Blakley v. Comm’r of Soc. Sec.*, 581 F.3d 399, 406 (6th Cir. 2009); *see also* 20 C.F.R. § 416.927(c).

After treaters, “[n]ext in the hierarchy are examining physicians and psychologists, who often see and examine claimants only once.” *Snell*, 2013 WL 372032, at *9.

Record reviewers are afforded the least deference and these “non-examining physicians’ opinions are on the lowest rung of the hierarchy of medical source opinions.” *Id.* “The regulations provide progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual [claimant] become weaker.” *Id.* (citing SSR 96-6p, 1996 WL 374180, at *2 (July 2, 1996)).

Plaintiff alleges the ALJ erred in assigning his treating psychiatrist Dr. Fitz’s opinion “no weight.” PageID 1032-35. On January 23, 2007, Dr. Fitz opined he had extreme limitations in his ability to maintain attention and concentration for extended periods; in his ability to perform activities within a schedule, maintain regular attendance, and be punctual with customary tolerances; and in his ability to complete a normal workday and workweek without limitations. PageID 805. Dr. Fitz also opined he was markedly limited in his ability to understand,

remember and carry out detailed instructions; in his ability to sustain an ordinary routine without special supervision; in his ability to work in coordination with or proximity to others without being distracted by them; and in his ability to make simple work related decisions. *Id.* Dr. Fitz also opined that Plaintiff was “unemployable.” PageID 804. In weighing Dr. Fitz’s opinion, the ALJ stated

[it] significantly predates the application filing date, and would be mere speculation regarding [Plaintiff’s] functioning six and seven years later in 2013 and 2014.... The opinion is not consistent with the findings on multiple mental status examinations during the relevant period, or with [Plaintiff’s] performance at college. Finally, it is not consistent with the suggestions in the record of improvement with compliance with treatment and medications. For this reasons, it is given no weight.

PageID 67.

“The proper inquiry in an application for SSI benefits is whether the [P]laintiff was disabled on or after [his or] her application date.” *See Casey v. Sec’y of Health and Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993). For purposes of SSI, which is not retroactive, the relevant period here is October 29, 2013, the date Plaintiff filed his application, to November 18, 2015, the date of the ALJ’s decision. 20 C.F.R. § 416.335; PageID 56-70, 236-41.

With regard to Dr. Fitz’s opinion that Plaintiff was “unemployable,” the ALJ properly weighed and provided a meaningful explanation for not relying on it to find Plaintiff disabled for purposes of disability under the Social Security Act. PageID 67. A medical source’s opinion -- including the opinion of a treating medical source -- that a claimant is disabled is an issue “reserved to the Commissioner” and not entitled to “any special significance.” 20 C.F.R. § 416.927(d).

While such an opinion must be considered, *see* SSR 96-5p, 1996 WL 374183, at *2-3 (1996), the ALJ did so in this case. *See id.* Thus, the ALJ followed the proper regulatory

procedures in considering the portion of Dr. Fitz's opinion stating Plaintiff was "unemployable," and his conclusion concerning such opinion is supported by substantial evidence.

In weighing Dr. Fitz's more specific workplace limitations contained in her 2007 opinion, however, the undersigned notes the ALJ's failure to mention the concept of "controlling weight." PageID 67. Any error in this regard can be harmless if the ALJ "has otherwise met the regulation's goal." *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 380 (6th Cir. 2013). The undersigned finds that the ALJ otherwise met the regulation's goal in assigning Dr. Fitz's 2007 opinion "no weight," by noting that it was of minimal relevance to the relevant period because it was created six years prior to the application date; was not supported by multiple mental status examinations or with Plaintiff's performance in college; and was inconsistent with the record showing Plaintiff's improvement with treatment and medications. PageID 67.

Based upon the foregoing, the undersigned finds the ALJ's assessment of Dr. Fitz's opinion supported by substantial evidence. As a result, the ALJ's findings in this regard should be affirmed.

B. Credibility

Plaintiff next challenges the ALJ's credibility finding, arguing that the ALJ's credibility evaluation was unsupported by substantial evidence. PageID 1036-39. The ALJ, and not this Court, "evaluate[s] the credibility of witnesses, including that of the claimant." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 247 (6th Cir. 2007). A reviewing Court must "accord the ALJ's determinations of credibility great weight and deference particularly since the ALJ has the opportunity, which we do not, of observing a witness's demeanor while testifying." *Jones v. Comm'r of Soc. Sec.*, 336 F.3d 469, 476 (6th Cir. 2003) (citations omitted).

Nevertheless, in setting forth a credibility finding, the ALJ's determination "cannot be based on an intangible or intuitive notion about an individual's credibility[.]" and instead, "[t]he

reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision.” *See* SSR 96-7p, 1996 WL 374186, at *7 (July 2, 1996). In fact, the ALJ must set forth “specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.” *Id.*

Pursuant to SSR 96-7p, upon determining that “an underlying physical or mental impairment” exists “that could reasonably be expected to produce the individual’s pain or other symptoms[.]” the ALJ must “evaluate the intensity, persistence, and limiting effects of the individual’s symptoms to determine the extent to which the symptoms limit the individual’s ability to do basic work activities.” *See* SSR 96-7p, 1996 WL 374186, at *7. Where a claimant’s subjective complaints concerning “the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence,” the ALJ must then determine the claimant’s credibility “based on a consideration of the entire case record.” *See id.*; 20 C.F.R. § 416.929(c)(3).

In considering the entire case record, 20 C.F.R. § 416.929(c)(3) and SSR 96-7p also require consideration of the following factors: (1) the claimant’s daily activities; (2) the location, duration, frequency, and intensity of symptoms; (3) factors that precipitate and aggravate symptoms; (4) the type, dosage, effectiveness, and side effects of any medication taken to alleviate the symptoms; (5) treatment undertaken by the claimant; (6) measures undertaken by the claimant to relieve symptoms, such as lying on one’s back; and (7) any other factors bearing on the limitations of the claimant to perform basic functions. 20 C.F.R. § 416.929(c)(3); *see Rogers v. Comm’r of Soc. Sec.*, 486 F.3d 234, 247 (6th Cir. 2007).

The ALJ's credibility analysis, when reviewing the ALJ's decision as a whole, extends beyond boilerplate language and sets forth a specific explanation as to why he found Plaintiff only "partially credible." PageID 65-66. Such conclusions are supported by substantial evidence and, as a result, the undersigned finds Plaintiff's contention regarding the ALJ's credibility assessment to be without merit.

C. Hypothetical Question

In his last assignment of error, Plaintiff contends that the VE's testimony during the administrative hearing, which Plaintiff suggests was given in response to one or more incomplete or insufficient hypothetical questions is not substantial evidence upon which the ALJ could rely in concluding that he can perform past relevant work as a hand packager. PageID 1039-10.

The ALJ must make a finding "supported by substantial evidence that [Plaintiff] has the vocational qualifications to perform specific jobs." *Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 238 (6th Cir. 2002) (internal citation omitted). "This kind of 'substantial evidence may be produced through reliance on the testimony of a [VE] in response to a 'hypothetical' question, but only if the question accurately portrays [Plaintiff's] individual physical and mental impairments.'" *Id.* (internal citation omitted). In formulating hypothetical questions, the ALJ need incorporate only those limitations accepted as credible. *Casey*, 987 F.2d at 1235.

The undersigned finds that the limitations set forth by the ALJ in the hypothetical questions to the VE (and the ALJ's resulting RFC) are supported by substantial evidence. Accordingly, the undersigned finds Plaintiff's alleged error in this regard to be without merit.

IV.

For the foregoing reasons, the Court finds Plaintiff's assignments of error unmeritorious. **IT IS THEREFORE RECOMMENDED THAT:** (1) the Commissioner's non-disability

finding be found supported by substantial evidence, and **AFFIRMED**; and (2) this case be **CLOSED**.

Date: January 17, 2018

s/ Michael J. Newman
Michael J. Newman
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendation. This period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d). Parties may seek an extension of the deadline to file objections by filing a motion for extension, which the Court may grant upon a showing of good cause.

Any objections filed shall specify the portions of the Report and Recommendation objected to, and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based, in whole or in part, upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs.

A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof. As noted above, this period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d).

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).